IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

FRIDAY, THE 5TH JANUARY 2007 / 15TH PAUSHA 1928

FAO.No. 6 of 2007()

AS.55/2002 of PRL.SUB COURT,IRINJALAKUDA
OS.1655/1999 of PRL.MUNSIFF'S COURT,IRINJALAKUDA

APPELLANT/1ST RESPONDENT/PLAINTIFF:

VARGHESE,
S/O.THATTAYIL EDATTUKARAN PAPPU,
MALA DESOM, VADAMA VILLAGE,
MUKUNDAPURAM TALUK.

BY ADV. SRI.RAJESH CHAKYAT

RESPONDENTS: APPELLANTS & 2ND RESPONDENT:DEFENDANTS:

1. MARY, AGED 62, W/O.EDATTUKARAN PAPPU,
MALA DESOM, VADAMALA VILLAGE,
MUKUNDAPURAM TALUK.

2. THRESIAMMA, AGED 38,
W/O.PADMADAN DEVASSY, MALA KADAPPUKKARA DESOM,
VADAMA VILLAGE AND D/O.THATTAYIL EDATHUKARAN
PAPPU.

3. ALAMMA, AGED 36, W/O.ELAPPULLY CHACKO,
PUDUKKAD DESOM, GOVT.HIGH SCHOOL,
THORAVU VILLAGE, AND D/O.THATTAYIL
EDATTUKARAN PAPPU.

4. MARY GOY, AGED 35,
W/O.JOY, M.G.284/NEW ASTC HUDCO PHASE VIII,
P.O.HOUNUR TAMILNADU AND D/O.THETTAYIL
EDATTUKARAN PAPPU, DO. DO.

5. ROSILY, AGED 31,
   W/O.MUTTANTHOTTI SEBASTIAN,
   KAVALAM KUZHICHIRA DESOM,
   KODUNGALLUR TALUK, D/O.THATTAYIL EDATTUKARAN
   PAPPU.

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON 05/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.T. SANKARAN, J.

F.A.O.NO. 6 OF 2007

Dated this the 5th day of January,2007

JUDGMENT

The plaintiff in O.S.No.1655 of 1999, on the file of the Court of the Principal Munsiff of Irinjalakuda, challenges the order of remand in A.S.No.55 of 2002, on the file of the Principal Subordinate Judge, Irinjalakuda.

2. The plaintiff and defendants 2 to 5 are children of deceased Pappu. The first defendant is the widow of Pappu. According to the plaintiff, the plaint schedule property belonged to Pappu and on his death, it devolved on the plaintiff and defendants. The plaintiff got release of the fractional rights of defendants 2 to 5 and, therefore, he claimed 2/3 rights in the plaint schedule property conceeding 1/3 right in favour of the first defendant, the widow of Pappu.

3. Defendants 1, 2, 3 and 5 filed a written statement wherein it was admitted that the plaint

schedule property belonged to Pappu. The relationship between the parties and the entitlement of shares to the plaintiff and other defendants in respect of the plaint schedule property were also admitted. However, a contention was raised in the written statement that there is another property in Sy.No.717/2 of Vadama village which belonged to Pappu and a counter claim was made praying for partitioning that property as well.

4. Before the trial court, the defendants were set exparte. On the same date on which they were set exparte, an application was filed to set aside the exparte order and that petition was allowed on condition of payment of costs of Rs.700/-. Costs were not paid and, therefore, the defendants could not contest the suit. The trial court decreed the suit for partition and held that the plaintiff is entitled to 2/3 right in the plaint schedule property. Since the defendants were set exparte, the counter claim was dismissed.

5. Defendants 1 to 3 and 5 filed appeal before the Lower Appellate Court. The Lower Appellate Court confirmed the preliminary decree in respect of the plaint schedule property. However, the Appellate Court remanded for fresh disposal, the counter claim filed by the defendants. In so far as the counter claim is concerned, the case of the defendants is that the property covered by the counter claim belonged to Pappu and, therefore, that property is partible. The case of the plaintiff is that that property belonged to Elamma, sister of Pappu under Ext.A6 assignment deed dated 4.2.1970 and that Elamma assigned the property to the plaintiff as per Ext.A5 assignment deed dated 15.9.1999. Thus the plaintiff claimed absolute title over the property covered by the counter claim. The Appellate Court noticed that there is a recital in Ext.A6 and also in Ext.A5 that Pappu had pankuvaram rights in the properties and, therefore, the case put forward by the defendants as to the partibility of that property is a matter to be enquired into after trial. The Appellate Court thought, by exercising the

discretion, that an opportunity should be afforded to the defendants to prosecute their counter claim and therefore, a remand was made to the trial court. The order of remand is under challenge in this appeal.

6. The learned counsel for the appellant submitted that the Appellate Court was not justified in remanding the case to the trial court. He also submitted that no case is made out by the defendants as to why they failed to pay the costs before the trial court as ordered in the application to set aside the exparte order. A contention was taken in substantial question of law No.2 that Ext.A5 sale deed cannot be challenged by the defendants since they are not parties to that document. It is contended that there is no justification for a remand.

7. The Appellate Court has given cogent reasons as to why a remand is necessary. The counter claim was dismissed for default. The prayer in the counter claim is for partition of the property covered by the counter

claim. Even if the counter claim is dismissed for default, nothing prevents the defendants from instituting a suit for partition claiming their share in the property. Therefore, no prejudice would be caused to the plaintiff by the remand of the counter claim. The contention that the defendants are not entitled to challenge the validity or otherwise of Ext.A5 is not sustainable in view of the decisions of this Court in **Kannan Nambiar** v. **Narayani Amma and others** (1984 KLT 855) and **Krishnan** v. **Parameswaran Pillai** (1989(1) KLT 63). Moreover, if the defendants are able to establish that Pappu had tenancy rights or some other rights, in spite of the fact that Ext.A5 was executed in favour of Elamma, they could claim the rights which devolved on them on the death of Pappu, provided Pappu had some rights in the immovable properties. This is a matter for evidence, documentary as well as oral. By a mere perusal of Ext.A5 and Ext.A6, the question cannot be decided, as rightly pointed out by the Appellate Court.

8. After considering the various contentions raised by the learned counsel for the appellant and after going through the judgments of the courts below, I do not find any ground to interfere with the order of remand.

The F.A.O fails and it is dismissed.

(K.T.SANKARAN)
Judge

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